# Unaffected Portions of the CAFO Rule Questions and Answers

(Post 2nd Circuit Court Decision)

**Purpose:** In 2003, EPA issued permitting and effluent limitations regulations for Concentrated Animal Feeding Operations (CAFOs). These regulations were challenged by several parties in a lawsuit brought before the US Court of Appeals for the Second Circuit. On February 28, 2005, the Court announced its decision. This decision left many aspects of EPA's CAFO regulations unchanged; in other areas more information was requested, and in other areas, the regulations were vacated. EPA is currently developing revised regulations to address the Court's decision.

This Questions and Answers fact sheet is intended to highlight certain key portions of the rule that remain unchanged following Second Circuit's ruling.

1. **What actions is EPA taking as a result of the Second Circuit's decision?**

**A:** EPA is developing revisions to the CAFO regulations to correspond to the court's decision. The regulatory revision process will include publishing proposed regulations, followed by a public comment period, consideration of public comments and amendments where appropriate, and then, promulgation of final regulations. Among other things, the revised regulations will address the vacature provisions concerning the duty to apply and the permitting process for nutrient management plans.

2. **If a CAFO had a permit at the time of the Second Circuit Court decision is it still in effect?**

**A:** Yes, the conditions of final NPDES permits already issued to CAFOs by States or EPA are not directly affected by the court decision and remain enforceable until and unless the permits are modified, revoked and reissued, or terminated in accordance with State or Federal regulations.
Note: Federal regulations allow permits to be modified due to judicial decisions remanding and staying EPA promulgated regulations or effluent limitation guidelines only if requested by the permittee within 90 days of a court decision [see 40 CFR 122.62(a)(3)(ii)]

3. **Did the definitions of an AFO and CAFO change?**

**A:** No, the court's decision did not affect the definitions of an "AFO" or "CAFO" in the 2003 regulations. In addition, the definitions for "Land Application Area," "Production Area," and "Process Wastewater" in the 2003 regulations remain in effect and are unchanged.
Note: All CAFOs remain "point sources" under the CWA
Definition of "AFO" and "CAFO" - see 40 CFR 122.23(b)(1) and (2)
Definition of "Land Application Area" - see 40 CFR 122.23(b)(3)
Definition of "Production Area" - see 40 CFR 122.23(b)(8)
Definition of "Process Wastewater" - see 40 CFR 122.23(b)(7)

**4. Which CAFOs must apply for a permit?**

**A:** The Second Circuit's decision invalidated the duty to apply provision in the CAFO regulations at 40 CFR 122.23(d). However, there is a duty to apply provision in the NPDES regulations at 40 CFR 122.21(a) that applies to point sources in general, including CAFOs. While the CAFO provision in section 122.23(d) would have required all CAFOs to apply for a permit, section 122.21(a) requires only a person who "discharges or proposes to discharge pollutants" to apply. The Second Circuit's decision did not invalidate section 122.21(a), nor is this provision's continued application to CAFOs inconsistent with the Court's decision (although EPA intends to remove the last sentence of section 122.21(a), which cross-references the duty to apply for CAFOs that was invalidated by the court). Therefore, under section 122.21(a), CAFOs currently are required to apply for an NPDES permit only if they discharge or propose to discharge pollutants.

It should also be noted that the definitions of both "Medium CAFO" and "Small CAFO" in the regulations include only those facilities that have an actual discharge. Thus, under section 122.21(a), all Medium and Small CAFOs must apply for a permit.

**5. Is there any benefit to the CAFO owner/operator to have an NPDES permit?**

**A:** Because all discharges are prohibited from unpermitted CAFOs, NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with CWA, and thus acts as a shield under CWA 402(k). For example, NPDES permits for Large CAFOs incorporate effluent guidelines provisions, which include in certain cases an allowance for discharge during rainfall events. This allowance is not available to unpermitted CAFOs.

**6. If a CAFO does not discharge or propose to discharge, which, if any, parts of the CAFO regulations apply to it?**

**A:** The CAFO must still comply with relevant requirements of the Clean Water Act. If a CAFO does not have a permit, any discharge of manure, litter or process wastewater from the 'production area' of a CAFO to a water of the United States is illegal. A discharge from the production areas includes (among other types of discharge) overflow from any containment structure under any climatic condition (either dry or wet), including chronic or catastrophic rainfall events.

As before the 2nd Circuit Court decision, any discharge of manure, litter or process wastewater not related to precipitation from a CAFO land application area' to a water of the United States is illegal in the absence of an NPDES permit. Examples include, but are not limited to:
– Discharge of litter, manure, or process wastewater directly to a water of the United States (e.g., application of liquid manure directly to a surface water)
– Dry-weather discharge due to the application of manure (e.g., gravity-induced discharge)
– Discharge of liquid manure from subsurface drains during dry-weather

EPA intends to address issues associated with precipitation related discharges from land application areas when the agency revises the CAFO rule.

**7. What happened to the "no potential to discharge" determination process?**

**A:** Under the Court's decision vacating the duty to apply, non-discharging CAFOs no longer have to request a determination of no potential to discharge to avoid permitting.

**8. Will the permit process for CAFOs change?**

**A:** Yes, as a result of the Second Circuit's decision, a facility-specific nutrient management plan must be submitted at the same time as the permit application or notice of intent to be covered by a general permit. However, under the regulations, NMPs are not required to be developed and implemented until December 31, 2006. In addition, all nutrient management plans must be made available for review by the public. And, after public review, the 'terms' of the nutrient management plan will become conditions of the permit. EPA intends to clarify the permit process in the revised regulations and/or ensuing guidance.

**9. Will the deadlines for permit applications and nutrient management plans change?**

**A:** Yes, EPA plans to change the deadlines for permit applications and nutrient management plans in the revised rule. The permit application date will be changed from February 13, 2006 to March 30, 2007. The NMP development and implementation dates will also be changed from December 31, 2006 to March 30, 2007.

EPA will be proposing a separate rulemaking to revise the CAFO compliance dates before the next compliance deadline.

**10. Will the requirements for what must be included in a Nutrient Management Plan (NMP) change?**

**A:** The requirements for what must be in an NMP will not change. CAFOs that are covered by NPDES permits must develop and implement NMPs that meet the requirements of 40CFR122.42(e) and for large CAFOs the ELG requirements of 40 CFR Part 412.

**11. Will it be possible to make changes to the nutrient management plan during the life of the permit?**

**A:** Yes, EPA plans to clarify the process for making revisions to the NMP during the term of the permit when the agency issues its rule revisions.

**12. Will any of the reporting requirements change for permitted CAFOs?**

**A:** No, CAFOs that are covered by NPDES permits must comply with all applicable recordkeeping and reporting requirements including those specified in 40 CFR 122.42(e).

**13. Did EPA's authority to require information and monitor compliance change?**

**A:** No, EPA retains broad authority under Section 308 of the Clean Water Act to:
– Require AFOs and CAFOs to establish and maintain records, make reports, conduct sampling, and provide information about the operation of their facilities

**14. Did EPA's authority to take enforcement actions for violations of the Clean Water Act change?**

**A:** No, EPA retains the authority under Section 309 of the Clean Water Act to enforce the CWA against the owner or operator of a CAFO who is in violation of the Act, its implementing regulations, or applicable permit requirements by:
– Issuing an administrative compliance order
– Filing an administrative civil penalty case, a civil judicial case for a civil penalty and injunctive relief, or a criminal action seeking a fine or imprisonment

**15. Has the court decision affected States' authority to enforce permit changes?**

**A:** No, States retain their authority, under applicable State law to enforce State permit program requirements:
– Where a State has adopted final regulations that are broader in scope or more stringent than federal regulations established by the May 2003 CAFO Rule as affected by the court decision, these more stringent State provisions remain enforceable as a matter of State law **only**.

**16. Did the citizen suit authorities under the Clean Water Act change?**

**A:** No, citizen enforcement of State regulations and permit violations are established and limited as prescribed under applicable State law. Under Section 505 of the Clean Water Act, any citizen may commence a civil action on his own behalf against:
– Any owner or operator of a CAFO alleged to be in violation of the Clean Water Act, implementing regulations, permit, or enforcement order.